



ACCESSING LEAVE ENTITLEMENTS AND STAND DOWN: CONSIDERATIONS FOR EMPLOYERS

The *Fair Work Act 2009* (Cth) (**Act**) allows an employer to “stand down an employee during a period in which the employee cannot usefully be employed because of ... a stoppage of work for any cause for which the employer cannot reasonably be held responsible” (section 524(1)(c) of the Act).

Whilst there was some initial confusion, it is now clear that a pandemic, such as COVID-19, would be the kind of event that would allow a business to stand down its employees under section 524 of the Act.

However, it must be remembered that section 524 of the Act is intended to relieve an employer of the obligation to pay wages to employees who cannot be *usefully employed* in certain limited circumstances.

Whether a particular employee can be usefully employed is a question of fact to be determined having regard to the circumstances that face the employer.

General Requirements To Stand Down All Or Part Of Your Workforce

To invoke section 524 of the Act, the employer will need to ask itself the following question to ensure it satisfies all of the necessary conditions:

Can the business establish that the reason for the stand down of the employee is because the employee cannot be usefully employed as a result of the coronavirus and the business' lack of viability if it had to continue to bear the burden of the employees' wages?

It is not sufficient that there be merely a downturn in business.

If there is work that an employee can undertake in other areas of the business, it will not be a stoppage and the stand down provisions under the Act will not be available to the employer.

Section 524 of the Act requires all prospects of useful employment elsewhere in the business to be exhausted before it is enlivened. The employer will, therefore, need to exhaust all other options such as directing employees to an alternative role if available before the employer is able to rely on the stand down provisions.

It is important to remember that if the employer cannot satisfy the requirements of section 524 above, it may be exposed to a dispute application under section 526 of the Act which would be dealt with by the Fair Work Commission most commonly by arbitration.

The consequences of standing a permanent employee down without pay and without lawful authority can be significant. The employer is likely to be liable for a constructive dismissal as well as unpaid wages.

Further, section 525 of the Act provides that an employee is not taken to be stood down during a period when the employee:

- is taking paid or unpaid leave that is authorised by the employer, or
- is otherwise authorised to be absent from his or her employment.

Standing Down An Employee: The Considerations

Standing down any part of a workforce is a drastic step as it will deprive employees of an income for an indeterminate period; however, stand down is not a permanent solution and employees cannot be expected to continue indefinitely as employees without being entitled to either return to work or have their positions made redundant.

It should also be noted that a period of stand down is still considered a period of service under section 22(2)(b)(ii) of the Act and therefore annual leave, personal leave and long service entitlements continue to accrue during a period of being stood down.

If your business is considering either 'shutting down', enforcing a 'stand down', or other alternatives to redundancy, we strongly recommend that you consult with your employees about the potential major changes to their ongoing employment.

This is a mandatory requirement under the Modern Awards even in times of COVID-19.

Annual Leave

Prior to the outbreak of COVID-19 we would have confidently stated that an employer should not unreasonably refuse an employee's request to take paid annual leave during any period of stand down. However, what is "reasonable" depends on the circumstances of the employee, and the employer's business needs.

There has been little guidance on this issue and notably conflicting views as to whether it would be unreasonable for an employer to refuse to allow an employee to take annual leave entitlements (or part thereof) during this time.

However, in the current unprecedented circumstances, it may be that an employer does not have the cash flow reserves to sustain annual leave payments for a number of employees during any prolonged period.

That raises the proposition, would it be reasonable for an employer to refuse an employee the ability to use their accrued but untaken annual leave entitlements during this time and therefore, not be required to make any payments at all to the employee during the period of stand down.

In light of the proposed relief announced by the Federal Government we are of the view that, on the strict reading of section 524 of the Act and the proposed relief being offered to permanent employees stood down from their employment due to COVID-19, that in circumstances where the employer is unable to meet the payment of the employee's leave entitlements as a direct result of a lack of cash flow due to imposed government measures, it will have acted reasonably in refusing an employee's request to take annual leave during the period of being stood down.

Personal Leave

On the back of the ABC report that Qantas is refusing to allow its 20,000 employees, stood down due to COVID-19, to use their entitlements to paid personal leave, the Qantas Engineers Alliance Unions (AMWU, ETU and AWU) has filed Federal Court proceedings seeking to challenge the airline's decision regarding an employee's use of accrued sick leave entitlements in absence of a legitimate medical purpose during stand downs.

This is an issue that affects many employees and employers at present, not just Qantas.

So what is the legal position?

The interaction between the stand down and sick leave provisions of the Act is not clear. It is therefore critical that employers exercise caution when denying an employee access to their accrued paid personal leave entitlements whilst stood down.

Qantas' argument involves a narrow approach to interpreting section 97(a) of the Act – an employee cannot be unfit 'for work', when there is no 'work' happening as a result of stand down; essentially Qantas' argument is based on the premise that there is no work to be absent from.

However, although the authorities are based on different statutory and award provisions, there is some old case law supporting the view that sick leave is available to employees without a legitimate medical purpose during stand down,

The Federal Court's ruling on this issue is therefore going to be critical for all businesses as well as employees regarding the power to deny employees the use of their accrued sick leave entitlements during periods of stand down.

Please note that where there is a legitimate medical basis for the employee to take sick leave, an employee cannot be prevented from accessing their accrued paid sick leave entitlements whilst stood down.



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We encourage all employers to obtain specific legal advice regarding standing down all or a portion of your workforce as you navigate and adapt to COVID-19.

For further information or assistance contact Murfett Legal on [+61 8 9388 3100](tel:+61893883100).

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